

# REQUEST TO CONTRAVENE A DEVELOPMENT STANDARD UNDER CLAUSE 4.6

cl. 4.4, Manly LEP 2013, Floor space ratio



41 Whistler Street, Manly NSW

Alterations and additions to existing semi-detached dwelling

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## PCN Urban

ABN 38 116 266 882

Level 19, 100 William Street, Woolloomooloo, NSW 2011

Phone: 0412 513967 email: [accounts@pcnurban.com.au](mailto:accounts@pcnurban.com.au)

Report Preparation	
Director	Philip North, BAppSc(EnvDes), BArch, MURP, GradCertHeritCons, RAIA MPIA CPP
Senior Planner	-

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Revision A			

*We acknowledge that the land on which we live, learn and work as the traditional country of the Gadigal people of the Eora Nation. We acknowledge these traditional owners of this land and acknowledge their living cultures and the unique roles they have played in maintaining life, language, and culture in this region. We pay respect to their Elders past, present and emerging and all aboriginal people.*

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## 1.0 INTRODUCTION

This request to contravene a development standard in respect of floor space ratio under Clause 4.4 - *Floor space ratio* of the *Manly Local Environmental Plan 2013* is submitted to accompany a development application for:

*alterations and additions to an existing semi-detached dwelling*

at 41 Whistler Street, Manly NSW.

It has been prepared with particular reference to the decisions of the Court in respect of:

- Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118;
- Four2Five Pty Limited v Ashfield Council [2015] NSWLEC 90;
- Wehbe v Pittwater Council [2007] NSWLEC 827;

and other relevant case law.

## 2.0 THE DEVELOPMENT STANDARD

### 2.1 The applicable planning instrument which specifies the development standard:

Manly Local Environmental Plan 2013

### 2.2 The number of the relevant clause:

Clause 4.4 – Floor space ratio

### 2.3 The provisions of the relevant clause:

Clause 4.4

*The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map.*

The floor space ratio shown on the map is 0.75:1.

## 3.0 THE CONTRAVENTION SOUGHT:

### 3.1 Description of the contravention:

The proposed development would contravene the development standard as follows:

#### 3.1.1 Site Area:

- 178.85m<sup>2</sup>

#### 3.1.2 Maximum floor space ratio:

- 0.75:1 (134.14m<sup>2</sup>)

#### 3.1.3 Existing floor space ratio:

- 0.8:1 (143.56m<sup>2</sup>)

#### 3.1.4 Proposed floor space ratio:

- 0.87:1 (156.19m<sup>2</sup>)

#### 3.1.5 Extent of contravention:

- 0.12:1 (22.05m<sup>2</sup>)

#### 3.1.6 Percentage of contravention:

- 16%

#### 3.1.7 Reason for contravention:

The contravention is associated with:

- Infill of part of the central courtyard on the ground floor (4m<sup>2</sup>); and

- A small expansion to the side and rear of the existing first floor (8.6m<sup>2</sup>).

#### 4.0 PROVISIONS OF CLAUSE 4.6

##### 4.1 Cl. 4.6(1): Objectives

Clause 4.6 seeks to provide appropriate flexibility to the application of development standards in order to achieve better planning outcomes both for the development and from the development. The objectives of Clause 4.6 are as follows:

Cl. 4.6(1) Objectives of Clause		
Clause	Control	Justification
(1)(a)	to provide an appropriate degree of flexibility in applying certain development standards to particular development	The proposal contravenes the floor space ratio development standard which sets a maximum floor space ratio . It seeks to utilise this clause to provide appropriate flexibility in application of the standard to permit approval.
(1)(b)	to achieve better outcomes for and from development by allowing flexibility in particular circumstances.	The proposal would achieve better outcomes: <ul style="list-style-type: none"> <li>• <b>For</b> the development: The contravention would permit: <ul style="list-style-type: none"> <li>○ Improved space standards to the existing dwelling; and</li> <li>○ More functional rooms.</li> </ul> </li> <li>• <b>From</b> the development: The contravention would result in: <ul style="list-style-type: none"> <li>○ Increased diversity of housing;</li> <li>○ More efficient utilisation of the site;</li> <li>○ Increased residential accommodation in an established area well served by infrastructure; and</li> <li>○ No adverse impacts upon the amenity of the locality.</li> </ul> </li> </ul>

##### 4.2 Cl. 4.6(2): Development standards excluded form operation of clause

Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

The relevant clause is not expressly excluded from the operation of clause 4.6.

##### 4.3 Cl. 4.6(3): Justification of the Contravention of the Development Standard

Under the provisions of clause 4.6(3) – Exceptions to development standards of *MLEP 2013*, the consent authority must be satisfied that the applicant has demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances and that there are sufficient environmental planning grounds to justify contravening the development standard. This is summarised in the table below:

Cl. 4.6(3) Justification of Contravention		
Clause	Control	Justification
4.6(3)	Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant has demonstrated that:	This written request addresses this clause.
4.6(3)(a)	compliance with the development standard is unreasonable or unnecessary in the circumstances (see the test under <i>Wehbe v Pittwater Council</i> below and assessment against the objectives of the zone and development standard), and	<ul style="list-style-type: none"> <li>• Compliance with the development standard is unnecessary given that the objectives of the development standard are met (see below).</li> <li>• Notwithstanding the non-compliance, compliance with the development standard is unreasonable given that:</li> </ul>

<b>Cl. 4.6(3) Justification of Contravention</b>		
<b>Clause</b>	<b>Control</b>	<b>Justification</b>
		<ul style="list-style-type: none"> <li>The lot is an undersized lot being less than the 250m<sup>2</sup> minimum lot size nominated for the site under cl. 4.1 of MLEP 2013;</li> <li>Clause 4.1.3.1 of the MDCP enables Council to consider an exception to the Floor Space Ratio to the extent of FSR calculated on the basis of a 250m<sup>2</sup> lot; this would permit a GFA of 187.5m<sup>2</sup>. The proposed GFA is 156.19m<sup>2</sup> which complies with this.</li> </ul>
4.6(3)(b)	That there are sufficient environmental planning grounds to justify contravening the development standard.	Sufficient environmental planning grounds, in accordance with the criteria established in Initial Action, are outlined below:
	As established in Initial Action [23], 'environmental planning grounds' refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act. These are as follows:	See below:
1.3(a)	to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,	The contravention would promote the social and economic welfare of the community and a better environment by more efficiently utilising the site thereby taking pressure off development on the urban fringe.
1.3(b)	to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,	The contravention would enable more ecologically sustainable development by more efficiently utilising land within an existing urban area serviced by existing utilities thereby taking pressure off development on the urban fringe.
1.3(c)	to promote the orderly and economic use and development of land,	The more efficient utilisation of the existing built form is consistent with the orderly and economic use and development of land.
1.3(d)	to promote the delivery and maintenance of affordable housing,	Not applicable.
1.3(e)	to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,	The contravention would enable more ecologically sustainable development by more efficiently utilising land within an existing urban area serviced by existing utilities thereby taking pressure off development on the urban fringe.
1.3(f)	to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),	The contravention would not alter the streetscape presentation of the site.
1.3(g)	to promote good design and amenity of the built environment,	The contravention would provide: <ul style="list-style-type: none"> <li>Additional accommodation;</li> <li>Improved internal amenity;</li> <li>Improved thermal performance through compliance with current thermal performance standards; and</li> <li>More efficient utilisation of an undersized lot.</li> </ul>
1.3(h)	to promote the proper construction and maintenance of buildings,	The contravention would facilitate provision of a higher standard of thermal performance through compliance with current thermal performance standards.

<b>Cl. 4.6(3) Justification of Contravention</b>		
<b>Clause</b>	<b>Control</b>	<b>Justification</b>
	including the protection of the health and safety of their occupants,	
1.3(i)	to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,	Not applicable.
1.3(j)	to provide increased opportunity for community participation in environmental planning and assessment.	Not applicable.

In *Wehbe v Pittwater Council* [2007] NSWLEC 827, Preston CJ established five potential tests for determining whether a development standard could be considered to be unreasonable or unnecessary. These are examined below:

<b>The Five Part Test: (in accordance with Preston CJ in <i>Wehbe v Pittwater Council</i> [2007] NSW LEC 827)</b>		
<b>Part</b>	<b>Test</b>	<b>Discussion</b>
1.	The objectives of the standard are achieved notwithstanding non-compliance with the standard.	The objectives of the development standard are achieved. See discussion under 4.4 below.
2.	The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.	The objectives of the standard are relevant to the proposal and an assessment of compliance is provided above. It is considered that the objectives of the standard have been met and therefore strict compliance is unnecessary.
3.	The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.	The underlying object of the development standard would be thwarted if strict compliance were required (see 4.4 below).
4.	The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable	The development standard has already been abandoned by the consent authority by operation of Clause 4.1.3.1 of the MDCP.
5.	the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.	Not applicable. The zoning of the land is considered appropriate.

#### **4.4 Cl. 4.6(3)(a) Objectives of the Zone & Development Standard**

Under the Five Part Test established in *Wehbe v Pittwater Council*, it may be demonstrated that the objectives of the standard are achieved notwithstanding non-compliance with the standard. This can be determined by an assessment of the consistency of the contravention with the objectives of the development standard. This assessment is summarised in the table below:

<b>Cl. 4.6(3)(a): Objectives of the development standard</b>		
<b>Clause</b>	<b>Objectives</b>	<b>Justification</b>
<b>4.4(1)</b>	<b>Floor space ratio</b>	
(a)	to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,	The contravention would not alter the existing character of the streetscape as it is located behind the front ridge and is associated with already existing elements.  Further, the desired future streetscape character is also dictated by Clause 4.1.3.1 of the MDCP which would permit a GFA for the site greater than that which is proposed.
(b)	to control building density and bulk in relation to a site area to ensure that development does not obscure important landscape and townscape features,	The contravention would be obscured behind and within existing beholding elements and would not result in any landscape or townscape features being obscured.
(c)	to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,	The contravention would be visually discrete and not materially alter the visual relationship between new development and the existing character and landscape of the area.
(d)	to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain,	The contravention would not give rise to any adverse amenity impacts in respect of overshadowing, bulk and scale or privacy.
(e)	to provide for the viability of Zone E1 and encourage the development, expansion and diversity of business activities that will contribute to economic growth, the retention of local services and employment opportunities in local centres.	N/A. the site is not located in Zone E1.

In circumstances where there are no significant adverse impacts resulting from the contravention of the development standard, it is unreasonable and unnecessary to require strict compliance.

## 5.0 CONCLUSION

This Clause 4.6 contravention request to clause 4.4 of MLEP 2013 – Floor space ratio, should be supported on the basis that strict application of the development standard is unnecessary and unreasonable given that:

- a) The development meets the stated objectives of clause 4.4, specifically:
  - a) to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,
  - b) to control building density and bulk in relation to a site area to ensure that development does not obscure important landscape and townscape features,
  - c) to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,
  - d) to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain,
  - e) to provide for the viability of Zone E1 and encourage the development, expansion and diversity of business activities that will contribute to economic growth, the retention of local services and employment opportunities in local centres.
- b) there are sufficient environmental planning grounds to justify contravening the development standard Including:
  - a) The lot is an undersized lot being less than the 250m<sup>2</sup> minimum lot size nominated for the site under cl. 4.1 of MLEP 2013;

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- b) Clause 4.1.3.1 of the MDCP enables Council to consider an exception to the Floor Space Ratio to the extent of FSR calculated on the basis of a 250m<sup>2</sup> lot; this would permit a GFA of 187.5m<sup>2</sup>. The proposed GFA is 156.19m<sup>2</sup> which complies with this.

For the reasons set out above, the development may be granted consent notwithstanding the contravention of the development standard in respect of floor space ratio in clause 4.4 of the MLEP 2013 – Floor space ratio.